United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 21, 2005

TO : Willie L. Clark, Regional Director
Region 11

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: In the Matter of RFS Ecusta, Inc.
Cases 11-CA-19727, 11-CA-20045

In the Matter of Ecusta Business Development Center
Cases 11-CA-20164, 11-CA-20305

133-8200
177-1667
177-1673
530-4825-6700
530-4825-9100
601-5050-1500
625-4412
625-4417-2800
625-8883-4580
737-2850-9500

These Section 8(a)(5) cases were submitted for advice as to whether a company that purchased a bankrupt's assets "free and clear" through a bankruptcy court auction constitutes a Golden State[1] successor.

We agree that the Region should dismiss, absent withdrawal, the allegation that the asset purchaser is a Golden State successor, because the order approving the sale of assets stated they would be purchased "free and clear" of all encumbrances, including liabilities arising under labor law; no objections to the sale were filed; and both the Board and the Charging Party Union informed the Bankruptcy Court that there was no allegation in the pending Board proceedings that would make the purchaser a Golden State successor.

FACTS

RFS Ecusta, Inc. ("Ecusta") manufactured pulp and paper for many years in Pisgah Forest, North Carolina. Its employees were represented by Paper, Allied-Industrial, Chemical & Energy Workers International Union (PACE) Local 1971 (the "Union").

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[1] Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168 (1973).

The most recent collective-bargaining agreement between Ecusta and the Union expired in October 2001. After the Union declined Ecusta's last and final offer for a successor agreement, Ecusta locked out over 600 employees and ceased its manufacturing operations in August 2002. On October 23, 2002, Ecusta filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware. On November 6, 2002, the Union filed a charge in Case 11-CA-19727, alleging numerous 8(a)(5) and 8(a)(3) violations, and on February 6, 2003,[2] the Union filed a Proof of Claim with the Court referencing that charge.[3] On March 28, the bankruptcy case was transferred to the United States Bankruptcy Court for the Western District of North Carolina.

On June 27, the Bankruptcy Court authorized the sale of Ecusta's assets, free and clear of all liens, claims, encumbrances, and other interests, to New Tech Environmental, Inc. ("New Tech") or its designee. The Court order stated that the purchaser was not Ecusta's successor and that it was not liable for any of Ecusta's debts and obligations, including, but not limited to, "any liabilities under any revenue, pension, ERISA, tax, labor, environmental or natural resource law, rule or regulation....in any way related to the operation of [Ecusta's] businesses prior to the Closing...." Neither the Union nor the Region filed objections to the free and clear sale order.[4]

In a letter dated July 3, the Union notified Ecusta that it had learned that Ecusta had recalled some unit employees without notifying the Union, and that Ecusta was not paying those employees properly. The Union demanded that Ecusta bargain and honor the terms of the expired collective-bargaining agreement. The Union also requested information about employees performing bargaining unit work. Ecusta did not respond. On July 17, the Union filed a charge against Ecusta in Case 11-CA-20045, alleging that it had generally refused to bargain in good faith.[5] Neither

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[2] All dates are in 2003 unless otherwise indicated.

[3] The Region dismissed all of the charge allegations except for a refusal to provide information allegation.

[4] The sale order was subsequently amended on July 25 and August 6.

[5] The charge also alleged that Ecusta had unlawfully discriminated against employees because of their Union membership. That allegation was eventually dismissed.

the Union nor the Region filed a Proof of Claim with the Bankruptcy court regarding this charge at that time.

On August 8, New Tech's designee, Ecusta Business Development Center, LLC ("EBDC"), purchased Ecusta's assets pursuant to the Bankruptcy Court's free and clear sale order. Neither the Union nor the Region filed an objection to the sale.[6] EBDC liquidated the majority of Ecusta's assets associated with paper production. However, EBDC maintained the pulp operation and environmental controls and hired employees, a majority of whom were former Ecusta employees.

On October 31, the Union sent EBDC a letter requesting recognition, bargaining, and information. EBDC did not respond.

Also on October 31, the Union amended its charge in Case 11-CA-20045 to specifically allege that Ecusta, since February, had unilaterally failed to pay employees wages and benefits according to the expired collective-bargaining agreement.[7] On November 25, the Region issued a consolidated complaint against Ecusta in Cases 11-CA-19727 and 11-CA-20045, alleging that it had failed to provide requested information and unilaterally changed the wages and benefits of its employees who were newly hired and recalled in February 2003. Ecusta failed to provide an answer to the consolidated complaint. Accordingly, on January 14, 2004, the Region filed a motion for summary judgment with the Board against Ecusta.

On February 27, 2004, the Region issued a complaint against EBDC in Case 11-CA-20164, alleging that EBDC was a Burns[8] successor to Ecusta, and that EBDC violated Section 8(a)(5) by refusing to recognize and bargain with the Union and failing to provide the Union with relevant requested information on October 31. On April 16, 2004, the Region issued a Consolidated Complaint in Cases 11-CA-20164 and 11-CA-20305, further alleging that EBDC had unilaterally adjusted work schedules and laid off employees.

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[6] Ecusta's Chapter 11 bankruptcy was then converted to Chapter 7 on August 12.

[7] The charge was also amended to allege that Ecusta had refused to provide the Union with relevant requested information.

[8] NLRB v. Burns International Security Services, Inc., 406 U.S. 272 (1972).

On June 1, 2004, EBDC filed a motion in Bankruptcy Court seeking an injunction prohibiting the Union from claiming in the pending Board proceedings that EBDC was Ecusta's successor, on the ground that such claims would be inconsistent with the free and clear sale order. On June 17, 2004, the Board, through the Special Litigation Branch, filed an opposition to EBDC's motion, arguing that the Board had exclusive jurisdiction to determine whether EBDC was a successor employer under the NLRA. In their briefs and at argument, both the Board and the Union noted that the unfair labor practice allegations pending against EBDC involved only its own post-closing date conduct, and that there was no claim that any financial liability transferred to EBDC because of the sale. The Bankruptcy Court denied EBDC's motion on August 26, 2004.

On August 31, 2004, the Board ruled on the Region's motion for summary judgment against Ecusta in Cases 11-CA-19727 and 11-CA-20045.[9] Specifically, the Board found that, as of February 2003, Ecusta had violated Section 8(a)(5) by unilaterally changing the wages and benefits of its newly-hired and recalled employees.[10] The Board also found that Ecusta had unlawfully refused to provide the Union with certain requested information, but remanded other information allegations for hearing.[11] The remanded portions of the complaint were subsequently withdrawn, and the charge allegations dismissed, on December 21, 2004.[12]

There is evidence that two high-ranking EBDC officials – Bernard Kelly[13] and Clifford Bell[14] – may have been

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[9] RFS Ecusta, Inc., 342 NLRB No. 91 (2004).

[10] Id., slip op. at 3.

[11] Id., slip op. at 2.

[12] In about October 2004, the Union raised for the first time the allegation that EBDC was a Golden State successor and could therefore be held jointly and severally liable for the remedial obligations of Ecusta. No hearing date has been set for the consolidated complaint against EBDC in Cases 11-CA-20164 and 11-CA-20305, pending resolution of the Golden State issue.

[13] Kelly is EBDC's Chief Financial Officer and Commercial Manager.

[14] Bell is EBDC's Managing Member and Chief Executive Officer.

working for Ecusta at the time it made the unlawful unilateral changes. Thus, Kelly testified before the Bankruptcy Court that Ecusta had retained him, from December 2002 until early May, to get its books and records in order because they were in disarray, and to get all of the documentation necessary for it to prepare its reports for the bankruptcy proceedings. In addition, the Union learned, in April or May, that Ecusta had been hiring and recalling employees through Bell. Both Kelly and Bell were affiliated with EBDC in August when it acquired Ecusta's assets.[15]

ACTION

We agree with the Region that EBDC is not liable, as a Golden State successor, for Ecusta's unlawful unilateral changes. The bankruptcy court order under which EBDC purchased Ecusta's assets provided that the sale would be "free and clear" of all encumbrances, including liabilities arising under labor law, and neither the Union nor the Region objected to the free and clear sale order. Moreover, the Union and the Board informed the Bankruptcy Court that the pending Board proceedings would not impose any financial liability upon EBDC because of the sale. Accordingly, the Golden State successor allegation should be dismissed, absent withdrawal.

An employer that acquires and operates a business in basically unchanged form, with knowledge of the predecessor's unfair labor practices, can be held liable for the predecessor's remedial obligations.[16] The knowledge requirement is satisfied if the successor was aware of the conduct underlying the unfair labor practices; the successor need not be aware of particular ULP charges or complaints.[17] Also, the successor's knowledge can be "actual" or "constructive." The concept of constructive knowledge incorporates the notion that a party is on notice

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[15] As EBDC's Chief Financial Officer, Kelly participated in the negotiation and purchase of Ecusta's assets.

[16] Golden State Bottling Co. v. NLRB, 414 U.S. at 168; Perma Vinyl Corp., 164 NLRB 968, 969 (1967), enfd. 398 F.2d 544 (5th Cir. 1968).

[17] Signal Communications, 284 NLRB 423, 429 (1987) (company that took over predecessor's business operation before ULP charge was filed against predecessor, but with knowledge of predecessor's unlawful conduct, was Golden State successor).

not only of facts known to it, but also facts that with "reasonable diligence" it would necessarily have discovered.[18] The successor bears the burden of proving lack of knowledge.[19]

In International Technical Products Corp.,[20] the Board found that the liability of a successor that purchased a Chapter 11 debtor's business with knowledge of the debtor's unfair labor practices was not extinguished by a bankruptcy court's order of a sale of assets free and clear of all liens, claims, and encumbrances. Under ITP, a Golden State successor's monetary liability was not extinguished by a bankruptcy court's order approving the free and clear transfer of the business because only the Board is charged with remedying violations of the NLRA.[21] However, there are significant open questions concerning ITP. The decision was not appealed and its reasoning has not been revisited by the Board.[22]

Moreover, by concluding that a backpay order cannot be extinguished or modified by a bankruptcy court, ITP arguably ignores the long-standing principle that a backpay award has no greater priority in bankruptcy proceedings than any other wage claim.[23] As such, it fails to take into

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[18] S. Bent & Bros., 336 NLRB 788, 791 (2001) (purchaser which was on notice of predecessor CBA's existence, CBA's provisions for benefit plans, and that predecessor had terminated the plans, reasonably should have known, through exercise of reasonable diligence, whether predecessor had bargained with the union before terminating the contractual plans, and whether predecessor had unilaterally terminated any of its extra-contractual benefit plans).

[19] Id. at 790.

[20] 249 NLRB 1301 (1980).

[21] Id. at 1303.

[22] Rather, in subsequent cases, the Board has cited ITP for its more limited teaching regarding the general impact of bankruptcy proceedings under Board action. See Evans Plumbing Co., 278 NLRB 67, 68 (1986), enfd. in pertinent part 810 F.2d 1089 (11th Cir. 1987); Better Building Supply Corp., 283 NLRB 93, 96-97 (1987), enfd. 837 F.2d 377 (9th Cir. 1988).

[23] See, e.g., Nathanson v. NLRB, 344 U.S. 25 (1952). See also International Technical Products, 249 NLRB at 1305, Member Penello dissenting ("the majority errs in failing to

account and reconcile the important competing objectives underlying that different Federal statutory scheme.[24]

We conclude that the instant case does not present a favorable vehicle for testing the continued viability of ITP. The Bankruptcy Court's order approving the sale provides for a transfer free and clear of all liens, claims, encumbrances, and other interests, including specifically liability under labor law. Thus, the Bankruptcy Court specifically discharged EBDC's liability for any labor law violations committed by Ecusta, and neither the Union nor the Region objected to the Court's order or filed a Proof of Claim prior to the sale. Even more significantly, in the Bankruptcy Court litigation over EBDC's motion for an injunction, both the Board and the Union expressly informed the Court that the Board proceedings against EBDC would not result in monetary liability.[25] For these reasons, even assuming EBDC would otherwise be found to be a Golden State successor, that allegation should be dismissed.[26]

We note that the only basis we would have for finding Golden State successorship in this case would be to impute EBDC with Kelly's and/or Bell's knowledge of Ecusta's

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conform the objectives of the [Act]...to the equally important objectives of the Bankruptcy Act and, moreover, ignores the clear instructions of the Supreme Court, in [Nathanson], that the Board's backpay orders are not entitled to special status under the Bankruptcy Act").

[24] Indeed, one court has expressly rejected International Technical Products in permitting a sale free and clear of Title VII liability. See In re New England Fish Co., 19 B.R. 323, 326-327 (Bkrtcy.W.D.Wash. 1982), cited with approval in NLRB v. Martin Arsham Sewing Co., 873 F.2d 884, 888 (6th Cir. 1989). See also In re All American of Ashburn, Inc., 56 B.R. 186, 189-90 (Bkrtcy.N.D.Ga. 1986), affd. 805 F.2d 1515 (11th Cir. 1986) (a free and clear sale precluded liability of a successor corporation stemming from a products liability claim against the predecessor corporation).

[25] At the time, the Region's unilateral change complaint and motion for summary judgment against Ecusta, which sought to impose monetary liability, were outstanding.

[26] See International Specialty Products, Inc., Cases 16-CA-23150, et al., Advice Memorandum dated December 29, 2003.

unlawful unilateral changes.[27] While there is evidence that both Kelly and Bell may have performed services for Ecusta at the time it made the unilateral changes, additional investigation would be required to determine the extent of their knowledge, if any, of the facts of Ecusta's unlawful conduct.[28] However, further investigation will not be necessary in this case, in light of our determination regarding International Technical Products and the impact of the free and clear sale.

B.J.K.

[27] When a successor official is aware of the predecessor's unfair labor practices, that knowledge can be imputed to the successor. See Wyandanch Engine Rebuilders, Inc., 328 NLRB 866, 874-75 (1999) (manager of successor had been president of predecessor, and had personally participated in predecessor's unfair labor practices); Bagel Bakers Council of New York, 226 NLRB 622, 630-31 (1976), enfd. 555 F.2d 304 (2d Cir. 1977) (successor's principal owner had learned of predecessor's unfair labor practices due to his prior position as unit employee and union member at predecessor).

[28] Cf. S. Bent & Bros., 336 NLRB at 791.